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(18,431.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No 578.

JOSEPH A. NESBITT AND CHARLES A. MOORE, APPELLANTS,

vs.

THE UNITED STATES AND THE SIOUX INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 17, 1902.

1 *Petition. Filed June* 23, 1891.

In the Court of Claims, December Term, 1890.

JOSEPH H. NESBITT and CHARLES A. MOORE, Formerly Partners Doing Business, under the Firm Name of Nesbitt & Moore, at Washington Ranch, Colorado, *vs.* THE GOVERNMENT OF THE UNITED STATES.	Indian Depredation. No. 2735.

To the honorable Court of Claims:

The claimants Joseph H. Nesbitt and Charles A. Moore respectfully represent:

1. That said Joseph H. Nesbitt is a citizen of the State of Nebraska and a resident of Gage county, Nebraska, his post-office address being Beatrice; that the said Charles A. Moore is a citizen of the State of Nebraska and a resident of Cheyenne county, Nebraska his post-office address being Sidney.

2. That claimants were at all times hereinafter mentioned partners doing business under the firm name of Nesbitt & Moore.

3. That the following-described property belonging to said firm of Nesbitt & Moore was on or about the 25th day of July, 1864 taken and driven away by Sioux Indians; that said Indians were of a nation or tribe then in amity with the United States; that the place where said property was taken by said Indians was at what was then known as Washington ranch in the Territory, now State, of Colorado upon the Platte river about fifty miles above Julesburg; that the said property so taken consisted of the articles and were of the values hereinafter stated, to wit:

Eighteen head of mules, then and there worth $200 each..	$3,600.00
Twenty-nine head of horses, then and there worth $150 each	4,350.00
Making a total of.....	$7,950.00

4. That claim for said property with affidavit in support thereof was on the 2nd day of March, 1891, filed in the office of the Secretary of the Interior, the items of said claim being therein presented in detail as hereinbefore set out; that no action has ever been taken upon said claim.

2 5. That the claimants are the sole owners of this claim and only persons interested therein, and no assignment or transfer of *of* said claim or any part thereof or interest therein has been made; that the claimants are justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets.

6. That the claimants have at all times borne true allegiance to the United States and have never in any way aided, abetted or en-

couraged rebellion against the said Government and said claimants believe the facts as stated in this petition to be true.

Wherefore your petitioners respectfully pray judgment against the defendant upon the facts and the law for the said sum of $7,950 with lawful fees and expenses — be allowed therefrom to their attorneys of record for prosecuting this claim, and that your petitioners may have such other and further relief in the premises as the nature of their case will require, and to this honorable court shall seem meet.

JOSEPH H. NESBITT AND
CHARLES A. MOORE,
By GRIGGS, RINAKER & BIBB,
Their Attorneys.

STATE OF NEBRASKA, }
Gage County, } ss:

Before me Thos. Yule a notary public in and for the county and State aforesaid personally appeared Joseph H. Nesbitt who being duly sworn according to law deposes and says that he is one of the petitioners named in the foregoing petition and that he has read over the foregoing petition and thoroughly understands the same and that the matters and facts therein stated are true to the best of his knowledge and belief.

JOSEPH H. NESBITT.

Subscribed and sworn to before me this 4th day of June, 1891.

[SEAL.]

THOS. YULE,
Notary Public.

3 II.—*Claimants' Request for Findings of Fact. Filed May* 24, 1900.

The claimants, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows:

1. That the claimants, Joseph H. Nesbitt and Charles *H.* Moore, were at the time that this depredation was committed July 25, 1864, partners and loyal citizens of the United States, living at Washington ranch, Weld county, Colorado, Nesbitt having been born in New York and Moore in Portage county, Ohio. See 2d deposition of Moore and statement of both partners.

2. That this claim was originally filed March 2, 1891, in the Interior Department; that Joseph H. Nesbitt and Chas. A. Moore were the sole and equal owners of said claim; and that Joseph A. Nesbitt died on February 2, 1892, at Beatrice, Gage county, Nebraska, and that Ada Nesbitt, his widow, was duly appointed and qualified as his administratrix and admitted as a party to this suit. (See stipulation of counsel filed on or about that date.)

3. That this claim was filed in the Interior Department of
4 the United States under the limitations and provisions of the act of March 3, 1891. See testimony on first page of petition, and papers on file from the Interior Department No. 6850.

4. That the Sioux Indians, who committed this depredation, were according to the bulk of the testimony and in accordance with the ruling of the court, in amity with the United States on the 25th day of July, 1864.

5. That the claimants lost through a raid made on their ranch on the Platte river, State of Colorado, by the Sioux Indians July 25, 1864, 18 head of mules valued at $200 each and 29 head of horses valued at $150 each, making a sum total of $7,950, at a fair valuation. See testimony of Joseph H. Nesbitt, John A. Nesbitt and Chas. A. Moore, and that they never recovered any of these animals and that they have never been paid any portion of this sum claimed, and never attempted to recoup themselves, and are entitled to recover it, and that no sale or assignment has ever been made of this claim.

6. That the partnership was formed between Nesbitt and Moore for a general freighting business in 1862 and dissolved the latter part of August, 1864.

5 March 2, 1891.
Statement of Damages Made to the Interior Department, with Accompanying Affidavit of Joseph H. Nesbit, One of the Claimants. Filed April 6, 1900. in the Court of Claims. J. R.

The Government of the United States Dr. to Joseph H. Nesbitt and Charles A. Moore, formerly doing business, under the firm name of Nesbitt & Moore, at Washington ranch, Colorado.

To eighteen head of mules at $200.00 each.....	$3,600.00
" twenty-nine head of horses at $150.00.....	4,350.00

driven off and stolen by the Sioux Indians in the latter part of July, 1864, from Washington ranch, about fifty miles from Julesburg, up the Platte river on the main road to Denver.

Affidavit of Joseph H. Nesbit hereto attached in support of this claim. Corroborative affidavits of other witnesses will be forwarded whenever Mr. Nesbitt is notified that this claim is filed and will be considered by the Government.

(Signed) GRIGGS, RINAKER & BIBB,
Beatrice, Neb., Attorneys for Claimant.

6 STATE OF NEBRASKA, } ss:
County of Gage, }

Joseph H. Nesbitt, being first duly sworn, says: That he is fifty-nine years old, lives in Gage county, Nebraska, and has lived there since 1878, and has since 1866, been living and engaged in farming in Kansas and Nebraska. Affiant says that in 1859 he commenced freighting between St. Joseph, Missouri, Omaha, and Nebraska City

to Denver, Colorado. In 1862, this affiant formed a copartnership with one Charles A. Moore, who was then living in Colorado, in the freighting business between said points, which said copartnership continued until the fall of 1864. In 1862, this affiant and the said Moore established a ranch, called Washington ranch in Colorado about fifty miles up the Platte river from Julesburg. Affiant and his said partner, Moore constructed upon said ranch a sod-house fifty by twenty-two feet inside measurement. Said house being one and one-half story-high; also sod stables sufficient to accommodate one hundred head of horses; also two corrals, one for horses and the other for cattle, together with other improvements. Affiant and the said Moore kept from one hundred and fifty to two hundred head of horses, mules, and cattle upon said ranch, and cut, cured and stored hay thereon sufficient for their said stock. The said Moore lived on the said ranch and had charge and control of the same, conducting it with the assistance of from two to eight men. That in the latter part of the month of July, 1864, affiant and his said partner Moore were the owners of, and had upon said ranch eighteen head of mules and thirty head of horses, said mules and horses belonging to affiant and the said Moore equally, and were used by said firm of Nesbitt & Moore in freighting as aforesaid.

7 Affiant says that at that time, to wit, in the latter part of July, 1864, — band of mounted Sioux Indians, about eight or nine in number made a raid upon the said ranch, and drove away all of said horses and mules, except one horse which was tied up at the rack in front of the house, the other horses and mules which were driven off by the Indians, having been turned out to graze, and were grazing at the time, a short distance from the ranch. At the time of the said raid, and when the said Indians drove off the said horses and mules, Moore and the man employed upon the ranch of whom there were three or four, were eating breakfast. That at the same time said Indians also drove away about fifty head of ponies that were on the ranch, but which did not belong to said firm. Affiant states that none of said mules and horses so taken and driven away by the Indians were ever recovered back by this affiant, or his said partner Moore; although said Moore and the other man on the ranch immediately gave chase as soon as they could get their arms, but inasmuch as the Indians had taken all of the horses and ponies upon the ranch, except one horse, they were unsuccessful in their efforts to prevent the Indians getting away with the stock, and neither affiant or his partner never saw or got trace of said horses or mules after they were so driven off by the said Indians. Affiant further states that neither himself nor the said Moore have ever received any pay or compensation of any kind or description for said eighteen head of mules and twenty-nine head of horses so stolen by the Indians. Affiant further says that said mules were worth on an average two hundred dollars a head and the horses were worth on an average one hundred and fifty dollars a head, all of said mules and horses being in fine condition.

8 Affiant further states that his former partner, the said Charles A. Moore, was, about six years ago, living at Sidney, Nebraska, and, if alive, knows personally, all of the facts hereinbefore stated. Affiant and said Moore have frequently since the said depredation talked this matter over, and have always intended to present their claim to the Government for the damages sustained by them in the loss of said horses and mules, as soon as any provision should be made for the payment or adjudication of this class of claims. Affiant has just this day seen in a newspaper, to wit, the "Omaha Daily Bee" of the 25th day of February, 1891 that a law is about to be enacted by Congress which provides a way of securing from the Government damages occasioned by Indian depredations, and that to secure the payment of claims for damages occurring prior to 1865, that claims for such damages must be filed with the Secretary of the Interior before said act becomes a law. Affiant attaches a copy of said newspaper article which is marked Exhibit "A" and made a part of this affidavit. Affiant has immediately prepared this affidavit setting forth the said claim of himself and his said partner in order that this affidavit and application may be filed with the honorable Secretary of the Interior, in time to come within the provisions of said proposed act of Congress. Affiant says that owing to the distance between this affiant who now lives at Beatrice, Nebraska, and the place affiant last knew said Moore to be, to wit, Nebraska, it is impossible for affiant to communicate with said Moore and secure his affidavit corroborating the statements herein made, at the present time. Affiant further says that besides said Moore, there is only one other person known to affiant, by whom the foregoing statements can be corroborated and proven; that said person

9 is John Nesbitt, a brother of this affiant, now residing in Osborne county, Kansas, and who at the time said horses and mules were taken by the Indians as aforesaid, was living upon and was personally present at said ranch, and saw said Indians driving said horses and mules away. Owing, however, to the lack of time, within which to secure the said John Nesbitt's affidavit, before said act of Congress will become a law, according to the article in the said Omaha Bee, this affiant has not been able to procure the affidavit of the said John Nesbitt corroborating the statements herein contained.

Affiant says that as soon as he is informed that this claim is duly filed with the Secretary of the Interior, and is not too late to be considered under the law, this affiant will procure the affidavit of the said Charles A. Moore and John Nesbitt, and whatever other corroborative proof this affiant can obtain, and forward the same in support of this claim and application.

Affiant further says that at the time the said horses and mules were stolen by the Indians, they were reasonably worth the sum of seven thousand nine hundred and fifty dollars ($7,950), in which amount affiant and the said Moore were then and there damaged.

(Signed) JOSEPH H. NESBITT.

Subscribed in my presence and sworn to before me this 25th day of February, A. D., 1891.

(Signed) R. S. BIBB,
[SEAL.] *Notary Public.*

(Signed) GRIGGS, RINAKER & BIBB,
Attorneys, Beatrice, Neb.

10 EXHIBIT "A."

The Omaha Daily Bee.

Wednesday, February 25, 1891.

WASHINGTON BUREAU THE BEE,
513 FOURTEENTH STREET,
WASHINGTON, D. C., *Feb.* 24, —.

Indian Depredation Claims.

The Indian depredation bill will undoubtedly become a law within a week and it is therefore of the highest importance for those who may be affected by its provisions to understand the limitations of the act. There seems to be a misunderstanding as to the date prior to which the claims can be prosecuted. Any claim on file or which shall be filed before the bill becomes a law, no matter when the depredations occurred, comes under the provision of the law, but no claim for depredations which occurred prior to 1865, unless they are on file when the bill becomes a law, can be adjudicated by the courts with jurisdiction for Indian depredation claims. All of the thousands of claims now on file and which have been presented either to Congress or the Interior Department can be considered by the courts and any claim filed with the Interior Department before the act takes effect can also be taken into consideration; but when the act goes into effect, as before stated, no claim based upon a depredation committed prior to the year 1865, will come under the provisions of the law. Claimants, therefore, who have not already filed their claims and whose claims were based upon injuries inflicted by Indians prior to 1865 should at once make out their affidavits, attach such evidence to them as they can secure and forward them at once to the Secretary of the Interior. Requests have come to several Senators, asking for petitions or declarations and blank forms for making out such claims. There are no such forms. All that is needed is a statement of the claim, properly sworn to, and with corroborative evidence which should be forwarded to the Secretary of the Interior.

11 Indian depredations.

NESBITT & MOORE
v.
THE UNITED STATES and SIOUX INDIANS. } No. 2735.

Defendants' Plea. Filed October 24, 1901 J. Randolph A.C.C.

Now comes the Assistant Attorney General and, after leave of the court first had and obtained, for plea to the declaration filed herein says that the court is without jurisdiction to hear and determine said cause, for the reason that the depredation charged is alleged to have been committed prior to the 1st of July, 1865, and that no claim for such depredation was ever presented to the Secretary of the Interior or the Congress of the United States, or any superintendent, agent, subagent, or commissioner, authorized under any act of Congress to inquire into such claims, within the meaning of the first proviso of the second section of the act of March 3, 1891.

And this the defendants are ready to verify.

JOHN G. THOMPSON,
Assistant Attorney General.

12 *Judgment of the Court.*

NESBITT and MOORE
vs.
THE UNITED STATES and THE SIOUX INDIANS. } No. 2735. Indian Depredation.

At a Court of Claims held on the second day of December 1901 judgment was ordered to be entered as follows:

The court on due consideration sustains the defendants' plea to the jurisdiction of this court, and do order that the petition of the claimants be dismissed.

BY THE COURT.

13 *Claimants' Application for and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause on the 2nd day of December 1901 in favor of the defendant-, the claimants by their attorney of record, on this 29th day of January, 1902, make application for, and give notice of, an appeal to the Supreme Court of the United States on the question of law, involving the jurisdiction of the court, under which the petition in this cause was dismissed.

BELVA A. LOCKWOOD,
Attorney for Claimants.

Filed January 29, 1902.

Ordered that the appeal be allowed as prayed for.
January 29, 1902.

BY THE COURT.

14 Court of Claims.

NESBITT and MOORE
vs.
THE UNITED STATES and THE SIOUX INDIANS. } No. 2735. Indian Depredation.

I, John Randolph assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the claimants' requests for facts, of the judgment of the court sustaining defendants' plea to the jurisdiction, and dismissing the petition, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 28 day of February A. D. 1902

Seal Court of Claims.

JOHN RANDOLPH
Ass't Clerk, Court of Claims.

Endorsed on cover: File No. 18,431. Court of Claims. Term No 578. Joseph H. Nesbitt and Charles A. Moore, appellants *vs.* The United States, and The Sioux Indians. Filed March 1st, 1902.

No. 578.

FILED
APR 16 1902
JAMES H. McKENNEY,
CLERK.

Brf. of Lockwood for Appls.

IN THE

Supreme Court of the United States

Filed April 16, 1902.

OCTOBER TERM OF 1901.

JOSEPH H. NESBITT AND CHARLES A. MOORE,
Appellants,
vs.
THE UNITED STATES AND THE SIOUX INDIANS.

Appeal from the Court of Claims.

No. 578.

Brief for the Appellants.

BELVA A. LOCKWOOD,
Of Counsel for Appellants.

Address:
619 F STREET N. W.,
Washington, D. C.

(8,431.)

The Supreme Court of the United States

OCTOBER TERM OF 1901.

JOSEPH H. NESBITT,
ADA NESBITT, Adminix., and
CHARLES A. MOORE,
Appellants,
vs.
THE UNITED STATES AND
THE SIOUX INDIANS.

No. 578,
Indian
Depredations.

Appeal from the U. S. Court of Claims.

Brief for Appellants.

1. This cause is appealed to this honorable Court to decide a technical question of law, which involves the jurisdiction of the Court of Claims to hear and determine it on its merits.

2. This cause was filed by the claimants in the Court of Claims by petition, as the record shows, June 23, 1891, for the *recovery* on an Indian depredation incurred July 25, 1864, to the amount of $7,950.00, against the United States and the Sioux Indians, under the Indian depredation act of March 3, 1891.

3. The original claim, however, was filed in the office of the Secretary of the Interior March 2, 1891, having been made out in the office of Griggs, Rinaker & Bibb, a firm of attorneys in Beatrice, Neb., Feb. 25, 1891, and transmitted thereto, and was numbered in the Secretary's office 6850.

4. Feb. 2, 1892, Joseph H. Nesbitt, one of the claimants, and the senior partner, died, and Ada Nesbitt, his widow and administratrix, was duly admitted as a party to this suit, with Belva A. Lockwood as her attorney, who, later was made attorney of record, in place of, and by consent of Messrs. Griggs, Rinaker & Bibb.

5. The cause thereafter proceeded in due course, the claimants filing the depositions of four witnesses to maintain their claim, with the usual notice to defendant, whose attorneys duly appeared at these examinations and cross-questioned the witnesses; but the defendant filed no pleas in the case, not even the general issue, as is required to be done within sixty days after receiving the printed brief in the case, unless the time is extended by order of the court, as required by section 4 of this statute, nor until years had elapsed; the claimants had closed their case, filed their request for findings of fact and brief, put their cause on the notice book for trial and had repeatedly urged the Government's counsel to proceed with the case.

6. Oct. 24, 1901, the United States, by its attorney, John G. Thompson, by leave of court, filed the following plea:

Defendants Plea to the Jurisdiction of the Court.

"Now comes the Assistant Attorney-General, and, after leave of the court first had and obtained, for plea to the dec-

laration filed herein, says, that the court is without jurisdiction to hear and determine said cause for the reason that the depredation charged is alleged to have been committed prior to the first of July, 1865; and that no claim for such depredation was ever presented to the Secretary of the Interior or the Congress of the United States, or any superintendent, agent, subagent or commissioner authorized under any act of Congress to inquire into such claims, within the meaning of the first proviso of the second section of the act of March 3, 1891."

8. The clause sec. 2, United States Statutes, Vol. 26, page 852, under which it is sought to defeat this cause, reads as follows:

"That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government. Provided: That no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed or has been or *is pending* prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent or subagent, or commissioner authorized under any act of Congress to inquire into such claims; but no case shall be considered pending *unless evidence has been presented therein;* and provided further: That all claims existing at the time of the taking effect of this act, shall be presented to the court

by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred. * * * *

9. On the hearing of this plea to the jurisdiction, the court below dismissed claimant's petition Oct. 24, 1901, in the following words, written on the back of the plea. "*Sustained* and petition dismissed under authority of Weston's case (29 C. Cls. p. 420) by the court."

From this decision the claimants by their attorney appealed Jan. 29, 1902.

10. This cause is not entirely synonymous with the Weston case, on the precedent for which it was dismissed, but if it were we would still appeal or protest against the decision, as that case, being small in amount, was not appealable.

11. The jist of the decision in the Weston case is in the second clause of the syllabus, which reads:

"The sworn allegations of the claimant appended to his claim required by rules prescribed by the Secretary of the Interior, are not evidence within the intent of the act." Now this is not law, but the opinion of the court.

12. We claim, however, that although weak, *it is testimony* in the Weston case, and we make a still stronger assertion that claimant's independent affidavit *is testimony in this case,* not perhaps, in accordance with the rules of what constitutes testimony in the Court of Claims, or in the United States Supreme Court, but such testimony as was contemplated by the act of March 3, 1901, such testimony as claimants had been accustomed to file in the Interior Department for several years previous to the passage of this

law and upon which hundreds of allowances had been found, and such testimony as the Secretary of the Interior was willing to receive in this case, did receive and gave the case the No. 6850 and notified the claimants of the filing.

See pages 3, 4, 5 and 6 of the Record.

13. We find in this cause a complete case made out in due form, in accordance with the law and the facts, and pending.

First. The statement of the claim made out very succinctly, giving dates, items, amounts and names of defendants, by a reputable firm of attorneys, who state that they "will file corroborative affidavits whenever Mr. Nesbitt is notified that this claim is filed, and will be considered by the Government."

Second. An affidavit *in extenso* by the claimant, detailing all of the particulars of the raid by the Sioux Indians, when made, how made, the number of animals taken and their value, and summing up the amount to $7,950.

Third. Exhibit "A," from the "Omaha Daily Bee," purporting to come from its Washington Bureau, giving information to claimants in that vicinity how to proceed in such cases.

14. Of course, no further testimony could be filed with Secretary of the Interior after this first filing, as he was forbidden by the act to any longer adjudicate the cases, and resort was had to the court, as contemplated.

15. Now we claim, and we do it advisedly, that every one of these papers is testimony, and such testimony as is named in the Indian depredation act of March 3, 1901. The second clause of the fourth section of which says: "In considering the merits of claims presented to the court *any tes-*

timony, affidavits, reports of special agents or other officers, and *such other papers as are now on file in the department* or in the courts relating to any such claims, *shall be considered by the court as competent evidence,* and such weight given thereto as in its judgment is right and proper."

16. The statute thus defines what is meant by *testimony in cases pending.* It does not leave it even to the discretion of the court, but says in effect that it shall accept such papers as the Secretary of the Interior in his judgment has seen fit to file in each case." It was not the intent of the law to shut out any honest claimant.

When before has it ever transpired under this Government, in Congress, the Department or the courts, that a claimant could not, by his own sworn affidavit of facts, present his claim for consideration, make his filing, have his number on the record and his cause be considered pending from that date? But the law says testimony must be filed. We have our testimony, not sufficient, perhaps, for the allowance of the case, but sufficient to have the case pending.

17. We believe that we have a right to be heard on the merits in this case in the Court of Claims, and we appeal to this higher court for such decision.

BELVA A. LOCKWOOD,
for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

JOSEPH H. NESBITT AND CHARLES A. MOORE, Appellants,
vs.
THE UNITED STATES AND THE SIOUX INDIANS. } No. 578.

Supplementary Brief for Appellants.

Statement of the Case.

This is an appeal from a judgment of the Court of Claims rendered under the Indian Depredation Act of March 3, 1891. (26 Stat. L., 851.)

By Section 2 of that Act it is provided that no claim accruing prior to July 1, 1865, shall be considered by the Court unless it had been or was pending before the Secretary of the Interior, or before Congress, or before some one of several authorized officers, at the time of the passage of the Act. The Act itself defines the term "pending" in these words: " * * * but no case

shall be considered pending unless evidence has been presented therein." (Section 2.)

The claim now sued on was presented to the Secretary of the Interior on March 2, 1891, the day before the passage of the Act, in the form of a statement of account showing the kind of property taken, the number of animals, their value, the date and place of the depredation. (Rec., p. 3.)

At the same time was filed the affidavit of one of the claimants, Nesbitt, showing the partnership, the ownership of a large number of animals, the loss of those for which the suit is brought, and other pertinent and material facts. (Rec., pp. 3, 4, 5, 6.)

The defendants filed their plea averring that the claim had not been "presented" to the Secretary of the Interior or other authorized body or officer, within the meaning of the Act of March 3, 1891. (Rec., p. 7.)

The Court of Claims sustained the plea and dismissed the petition. (Rec., p. 7.)

The plea, as to the fact it avers, seems not to be authorized by any provision of the Act in question; and is certainly not accurate in averring that the claim was not "presented," since clearly it was "presented" to the Secretary of the Interior. The Court, however, must have considered the plea as raising the issue whether the claim was "pending" within the meaning of the jurisdictional act.

Whether it was "pending" depends entirely upon whether the affidavit of the claimant Nesbitt is evidence.

By section 11 of the Act in question, it is provided:

> "That all papers, reports, evidence, records, and proceedings now on file or of record in any of the Departments * * * shall be furnished to the Court upon its order, or at the request of the Attorney General."

By Section 4 of the Act it is provided that:

> "In considering the merits of claims presented to the Court any testimony, affidavits * * * and such other papers as are now on file in the Departments relating to any such claims, shall be considered by the Court as competent evidence."

Certainly by these two provisions the law declares to be admissible as evidence before the Court, *any evidence*, reports, records or papers on file in the Interior Department, and it must be that by these declarations is determined what that evidence is which is referred to in the Act.

The error of the defendants, and of the Court of Claims, is that they would hold all claimants to the filing of evidence in the Interior Department which complied with certain prescribed rules and regulations of the Secretary; and the effect of the Court's decision is to declare that if it does not comply with those certain rules and regulations, it is not evidence. If the law had intended that nothing should be considered evidence except that which complied with those regulations, it is most reasonable to assume that it would have been so

declared in terms. At the same time it would have been most unreasonable, as will appear from an inspection of the regulations, which are copied in the defendant's brief.

If to entitle affidavits filed before the Secretary to be considered "evidence," compliance with those regulations was necessary, such compliance must of course have been complete. To fail, therefore, in any one of the particulars prescribed, would deny to the affidavits any evidentiary character. It is not a difficult matter to suppose a case wherein it would be impossible to comply with those regulations. By reference to the rules prescribed, as they appear in defendants' brief, it will be seen that it was made the duty of the claimant to file a sworn declaration setting forth a number of facts, of some of which he could not have had knowledge unless he were present, actually witnessing the depredation.

Also it will be noted that the claimant was required to file the "depositions of two or more persons having personal cognizance of the facts. * * *" If therefore the claimant had produced to the Secretary but one witness having personal cognizance of some of the facts, the claim would not be pending, under the contention of the defendants. And yet the provision of the Act of March 3, 1891, is that the claim should be considered pending "if evidence was filed therein." Is it not true that the deposition of one witness would be evidence as clearly as the depositions of two witnesses, or a dozen?

Again, if in the filing of a claim before the Secretary of the Interior the regulations had been fully complied

with, the presumption is that the Secretary would have allowed the claim under the authority of the laws under which he was proceeding. And if he had allowed the claims, they would have gone to the jurisdiction of the Court of Claims under an entirely different paragraph of the jurisdictional act, namely, that paragraph (second) relating to allowed cases.

The brief for the defendants does not fairly state the record, in the statement that the claimant filed his sworn declaration as required by the statute, and that "appended to that declaration was a bill or statement of account or letter from his attorneys." The claimant filed his statement of damages, made out and signed by his attorneys, and appended to that was, not a sworn declaration, as defendants say in their brief, but an affidavit of the claimant Nesbitt, not purporting to be a declaration, or an application, but purporting to be an affidavit in proof of the loss. It is not the statement of damages which we claim to be evidence, but the affidavit of the claimant in support of that statement.

It must be manifest to the Court that if this were the affidavit of a disinterested person, it would be evidence within the meaning of the law, so that the case would clearly have been pending. The question, therefore, is whether the affidavit of one of the interested parties is also evidence. On this point there is no distinction made in the Act, and in the absence of such distinction, there is no authority for the statement that the affidavit of a claimant, filed as proof, is not just as competent evidence as the affidavit of a disinterested person.

It is further observed that, under the provisions of this Act, any affidavit or paper filed in the office of the Secretary of the Interior is competent evidence in the Court of Claims. It would seem a strange doctrine which would declare such paper to be competent evidence in a court, and yet not to possess any evidentiary character at all before the Secretary of the Interior, who accepted and filed it.

It is to be observed in this connection that some virtue must be given to the claim because it was admitted to filing by the Secretary. It not infrequently happens that rules, even of courts, fall into disuse, and that procedure becomes a matter of custom. The authority which prescribed these rules and regulations could annul or disregard them; and we may reasonably assume that they were waived, at least, in this case, by reason of the fact of the admission of the claim to the files and the subsequent transmission of the papers to the Court of Claims.

The defendants cite and rely upon the decision of the Court of Claims in the case of Weston *vs.* U. S. (29 C. Cls., 420.) The facts in that case and this one are somewhat different. In that case the claimant filed what purported to be a "declaration for Indian depredations," which was sworn to, and accompanied this with the joint affidavit of two witnesses, declaring the claimant to be the identical person she represented herself to be, and attesting to the execution of the sworn declaration by her.

In this case, the declaration is in the form of a statement of account against the United States in which

these losses are itemized, and this is supported by an affidavit of the claimant purporting to be an affidavit, and not purporting to be a declaration. While the cases are in this respect different, it would seem that the decision of the Court in the Weston case (*supra*) has some application. The Court declared in that case that—

> "The sworn allegations of the claimant, relied upon as evidence presented to the Secretary of the Interior, were nothing more than were required by the rules of the Secretary to form part of the application for payment, and can not be considered as evidence made necessary by the Act to constitute a case pending."

The Court further declared that the evidence referred to in the Act of March 3, 1891, meant evidence "competent by the ordinary rules of law." Counsel submits that this statement is clearly erroneous. When it is borne in mind that the Interior Department was not a court presided over by men learned in the law, but was a mere Department of the Government, where it was not presumed that proceedings were conducted as in a legal forum, it does not seem reasonable that it was the purpose of Congress to require that the prosecution of a claim there be conducted in accordance with the strict rules of law in any particular.

This conclusion seems entirely warranted in the language of the act authorizing the Secretary of the Interior to examine claims of this character, where it is provided that the Secretary prescribe "the degree and character of evidence necessary to support such claims."

(17 Stat. L., p. 190.) Certainly, if it had been the purpose to require the evidence presented to the Secretary of the Interior to be such as was competent under the ordinary rules of law, he would not have been given the power to prescribe "the degree and character of evidence" to be received in support of such claims. If, therefore, the Secretary could prescribe the degree and character of the evidence he would receive, and was not bound to prescribe such evidence as would be competent under ordinary rules of law, the presumption necessarily is that the evidence filed in this case came within the degree and character prescribed by him, since he admitted it to filing and has transmitted it to the Court.

Defendants' brief refers to a passage in the opinion of the Court in the case of Weston (*supra*) surmising that the intention of Congress in making this provision was to exclude those who, while the bill was pending before Congress, hastened to make application for payment of claims. We may admit this conjecture was correct, but it can hardly be said that the benefit of the law was not to be given to a claim filed the day before the passage of the Act as well as to one filed a year before, or ten years before, if evidence was also filed to support it. For the Act of March 3, 1891, did not exclude any claims filed prior to its passage. It excluded all claims, without regard to when the application was made, if evidence was not filed in support thereof. But it made no distinction between the cases filed early or those filed late, if evidence was also filed.

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Attorney for Claimants.

No. 578.

Br. of Attorney Gen. (Thompson)
for Appellees.

Filed April 23, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

JOSEPH H. NESBITT AND CHARLES A. MOORE, appellants,
v.
THE UNITED STATES AND THE SIOUX INDIANS.
No. 578.

BRIEF FOR THE APPELLEES.

JOHN G. THOMPSON,
Assistant Attorney-General.

LINCOLN B. SMITH,
Assistant Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

JOSEPH H. NESBITT, ADA NESBITT, administratrix, and Charles A. Moore,
v.
THE UNITED STATES AND THE SIOUX Indians.
} No. 578.

BRIEF FOR APPELLEES.

This was a suit brought in the Court of Claims under the Indian depredation act of March 3, 1891 (1st Supp. R. S., 2d ed., 913), for the recovery of $7,950 for property alleged to have been taken from the claimants' possession by certain Indians belonging to the Sioux tribe. The depredation occurred in July, 1864. The petition was filed on June 23, 1891. Prior to the filing of this petition no demand had ever been made upon the United States nor upon the defendant tribe of Indians, except by the presentation of the claim to the Secretary of the Interior on March 2, 1891. The demand was, therefore, made for the first time when the claim was 27 years old.

The Court of Claims dismissed the petition for want of jurisdiction under the authority of the *Weston case* (29 C. Cls. R., 420). The claimants thereupon appealed to this court.

The jurisdictional act under which suit was brought in the Court of Claims provides (sec. 2) that:

> All questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government: *Provided*, That no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed, or has been or is pending, prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, subagent, or commissioner authorized under any act of Congress to inquire into such claims; *but no case shall be considered pending unless evidence has been presented therein.*

This claim accrued prior to July 1, 1865. It had not been allowed by the Secretary of the Interior, and it is not claimed that it was pending before any of the officers named in the proviso, except the Secretary of the Interior. The question is, therefore, whether it was "pending" before that officer within the meaning of the statute.

Ordinarily a claim is pending before executive officers as soon as an application for payment is properly made in accordance with the rules applicable thereto. But Congress did not use the word "pending" in its ordinary sense, as it expressly declares in the act that "no case shall be considered pending unless evidence has been presented therein."

The evidence upon which the appellant relies to bring the claim within this description is found in the record on appeal, pages 3 to 6. It consists solely of the sworn ex parte declaration of one of the claimants, Joseph H. Nesbitt. Manifestly this statement would not be "evidence" according to the ordinary rules of law. Was it evidence in this claim before the Secretary of the Interior?

All claims filed in the Interior Department after 1872 were filed under the authority of the act of May 29 of that year (17 Stat. L., 190; secs. 445 and 446, R. S.), which provides *inter alia* that—

> It shall be the duty of the Secretary of the Interior to prepare and cause to be published such rules and regulations as he may deem necessary or proper, prescribing the manner of presenting claims arising under existing laws or treaty stipulation, for compensation for depredations committed by Indians, *and the degree and character of the evidence necessary to support such claims.*

Under such authority the Secretary of the Interior did prepare and cause to be published certain rules and regulations governing the presentation of Indian depredation claims. Such portions as are pertinent are here reproduced.

> 1. Application for indemnity or satisfaction for the loss or injury sustained must be made by the claimant, his attorney, or duly authorized agent, * * * to the United States * * * Indian agent, subagent, within whose

jurisdiction or charge the nation, tribe, or band is to which the offenders or depredators belong.

2. The necessary documents and proofs must accompany the application of the claimant, his attorney, or agent, and should be in legal form, and consist—

First. Of the sworn declaration of the claimant, setting forth when and where the depredation was committed, and by what Indians, their tribe or nation being named; describing fully the property stolen or destroyed, and giving the quantity of each article or number, condition, or quality thereof, and the just value of each article or piece of property at the time the same was so taken or destroyed. Should the depredation have been committed while the claimant was in the Indian country, he must state whether he was lawfully there, either having a license to trade with the Indians, a passport, or a permit from the proper Indian authorities, or was *en route* through said country to a place of ultimate destination at some point within the limits of any State or Territory not included within the limits of the reservation for any nation or tribe of Indians set apart by treaty provision, or by Executive order; and he in such declaration must further state whether any of the property so stolen or destroyed has subsequently been recovered by or for him, the claimant; and whether the claimant has at any time received part compensation therefor; and if so, how much, when, and from what source; and further, that the claimant has in no way endeavored to obtain private satisfaction or revenge.

> Second. Of depositions of two or more persons having personal cognizance of the facts or any of them as embraced in the declaration of the claimant, which depositions must set forth the means of knowledge which deponents have as to the fact of the depredation, when, where, by what Indians, and under what circumstances the depredation was committed, of what the property consisted that was so taken or destroyed by the Indians, describing it as fully as practicable, and stating the value thereof. If the deponents, or any of them, were at the time of the depredation in the employment of the claimant it must be so stated, and in what capacity. (Regulations Indian Department, 1884, p. 81.)

From the above rules it appears that in order to institute a claim for Indian depredations it was necessary to present the sworn declaration of the claimant, setting forth in detail the circumstances of the alleged loss. This sworn declaration must be supported of course by evidence, and that evidence must consist of the depositions of two or more witnesses having personal cognizance of the facts.

Clearly the declaration of the claimant was no more evidence before the Interior Department than is the petition in the Court of Claims, which, as provided by the statute, must contain substantially the same allegations and particulars, and must also be verified by the affidavit of the claimant or of his attorney.

> The sworn allegations of the claimant, relied upon as evidence presented to the Secretary of

> the Interior, were nothing more than were required by the rules of the Secretary to form part of the application for payment, and can not be considered as evidence made necessary by the act to constitute a case pending. (*Weston's case*, 29 C. Cls. R., 420, 423.)

In this case the claimant filed his sworn declaration, as required by the statute and the regulations made thereunder. Appended to that declaration were a bill or statement of account or letter from his attorneys, transmitting the declaration and stating that corroborative affidavits of other witnesses would be forwarded upon notification that the claim would be considered (R., p. 3), and an extract from a newspaper advising prospective claimants to file their claims before the passage of the bill then pending. Neither of these papers can be considered evidence by any stretch of the imagination.

If the claimant's sworn declaration be "evidence" within the contemplation of the statute, then the limitation provided in section 2 would be meaningless, since such declaration under oath was required by the rules in every application; and if this be evidence, then all applications were pending without regard to the evidence presented. (*Weston's case*, 29 C. Cls. R., 420, 424.)

The second clause of the fourth section of the statute, relied upon by the learned counsel for the appellants, (Brief, p. 5) is not applicable to this question. That section, as pointed out by the chief justice in the

Weston case, applies only to evidence made competent in the Court of Claims after the passage of the act.

The undoubted intent of Congress in excluding cases wherein evidence had not been presented was, as stated by Chief Justice Richardson,

> to protect those who had incurred the expense of taking testimony and collecting evidence and presenting the same to the Department, and to exclude those who had made application for payment and thereafter had taken no steps for the prosecution of their claims, *and especially to exclude those who, while the bill was pending before Congress, hastened to make application for payment of claims which had been neglected for so many years as to labor under the presumption, or suspicion at least, of being visionary or stale.* (*Weston's case*, 29 C. Cls. R., 420, 424.)

This case is preeminently one of the class which it was the intent of Congress to exclude. The claimant alleges that he suffered from a depredation by Indians in 1864; yet for twenty-seven years he slept upon his rights, made no complaint, made no application for indemnity, and served no notice of his claim upon the United States or the Indian tribe. The failure to present evidence in support of his claim prior to the date fixed by the statute was due wholly to his own negligence. Such cases as this were precisely those which Congress intended to exclude. To quote again from the opinion in Weston's case: "What has happened was probably anticipated by Congress; that during the pendency of the bill a large number of claims

would be presented to the Secretary of the Interior with the hope of gaining a standing in the Court of Claims under the act without having incurred any expense whatever in obtaining and presenting evidence in their support." To this it may be added that not only did such claimants fail to present any evidence in support of their claims, but they, by their neglect and failure to present such claims, necessarily deprived the defendants of the opportunity of securing evidence concerning the alleged depredations while the witnesses and actors were living and accessible.

The claimant's belated action in filing his claim on the day before the passage of the act was not sufficient to take the case out of the bar of the statute; and the judgment of the Court of Claims dismissing his petition for want of jurisdiction should be affirmed.

JOHN G. THOMPSON,
Assistant Attorney-General.

LINCOLN B. SMITH,
Assistant Attorney.

O

Supreme Court of the United States.

No. 578.—October Term, 1901.

Joseph A. Nesbitt and Charles A. Moore, Appellants, vs. The United States and the Sioux Indians. } Appeal from the Court of Claims.

[May 19, 1902.]

Mr. Justice McKenna delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims sustaining a plea to the jurisdiction of the court to hear a petition filed by appellants under the Indian Depredation Act of 1891.

The purpose of the petition was to recover the sum of $7,950 against the United States, for the value of eighteen head of mules and twenty-nine head of horses, alleged to have been taken and driven away by the Sioux Indians on or about the 25th day of July, 1864.

The plea to the jurisdiction of the court was based upon the fact that the depredation charged was alleged to have been committed "prior to the 1st of July, 1865, and that no claim for such depredation was ever presented to the Secretary of the Interior or the Congress of the United States, or any superintendent, agent, subagent or commissioner, authorized under any act of Congress to inquire into such claims, within the meaning of the first proviso of the second section of the act of March 3, 1891."

Section 2 of the act of 1891 reads as follows:

"That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the government: *Provided*, That no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed or has been or is pending prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent or sub-agent, or commissioner authorized under any act of Congress to inquire into such claims; but no case shall be considered pending unless evidence has been presented therein: *And provided further*, That all claims existing at the time of the taking effect of this act, shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred."

The claim was filed in the Interior Department March 2, 1891, before the passage of the act, but it is contended by the government that it was not "pending" before the Secretary of the Interior because no evidence had been "presented therein."

The affidavit of Joseph A. Nesbitt accompanied the claim, and was very full as to the locality and circumstances of the depredation. It also stated the attempts which were made to recover the animals and the failure of the attempts, and gave the names of the witness by whom the depredation could be proved.

The question in the case is whether such affidavit constituted the presentation of evidence of the claim so as to bring the claim within the statute.

Claims for Indian depredations filed in the Interior Department after 1872 were filed under the act of 1872. (17 Stat. 190.) Section 7 of the act reads as follows:

"That it shall be the duty of the Secretary of the Interior to prepare and cause to be published such rules and regulations as he may deem necessary or proper, prescribing the manner of presenting claims arising under existing laws or treaty stipulations, for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims; he shall carefully investigate all such claims, as may be presented, subject to the rules and regulations prepared by him, and report to Congress at each session thereof the nature, character and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based: *Provided*, That no payment on account of said claims shall be made without a specific appropriation therefor by Congress."

In pursuance of that act the Secretary of the Interior established the following regulations:

"1. Application for indemnity, or satisfaction for the loss or injury sustained, must be made by the claimant, his attorney, or duly authorized agent, . . . to the United States, . . . Indian agent, subagent, within whose jurisdiction or charge the nation, tribe or band is to which the offenders or depredators belong.

"2. The necessary documents and proofs must accompany the application of the claimant, his attorney, or agent, and should be in legal form, and consist—

"First. Of the sworn declaration of the claimant, setting forth when and where the depredation was committed, and by what Indians, their tribe or nation being named; describing fully the property stolen or destroyed, and giving the quantity of each article or number, condition, or quality thereof, and the just value of each article or piece of property at the time the same was so taken or destroyed. Should the depredation have been committed while the claimant was in the Indian country, he must state whether he was lawfully there, either having a license to trade with the Indians, a passport, or a permit from the proper Indian authorities, or was *en route* through said country to a place of ultimate destination at some point within the limits of any State or Territory not included within the limits of the reservation for any nation or tribe of Indians set apart by treaty provision, or by executive order; and he in such declaration must further state whether any of the property so stolen or destroyed has subsequently been recovered by or for him, the claimant; and whether

the claimant has at any time received part compensation therefor; and if so, how much, when, and from what source; and further, that the claimant has in no way endeavored to obtain private satisfaction or revenge.

"Second. Of depositions of two or more persons having personal cognizance of the facts or any of them as embraced in the declaration of the claimant, which depositions must set forth the means of knowledge which deponents have as to the fact of the depredation, when, where, by what Indians, and under what circumstances the depredation was committed, of what the property consisted that was so taken or destroyed by the Indians, describing it as fully as practicable, and stating the value thereof. If the deponents, or any of them, were at the time of the depredation in the employment of the claimant it must be so stated, and in what capacity. (Regulations Indian Department, 1884, p. 81.)"

To the requirements of the act of 1872, and the regulations authorized by it, the word "evidence," in the act of 1891, must be considered as referring, and the claim of the appellant was not accompanied by such evidence. It was accompanied by the deposition of one of the claimants, but not of "depositions of two or more persons having personal cognizance of the facts or any of them as embraced in the declaration of the claimants." Persons having such knowledge existed, it was stated, and their affidavits promised, but they had not been presented.

Nor is the petitioner helped by section 4 of the act of 1891, which provides that—

"In considering the merits of claims presented to the court any testimony, affidavits, . . . and such other papers as are now on file in the departments relating to any such claims, shall be considered by the court as competent evidence."

That provision is applicable to the claim after it is presented to the court, and does not relieve from the conditions expressed in section 2. See *Weston's case*, (29 C. Cls. R. 420, 424,) where the provisions of the statutes and the reasons for them are clearly expressed.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.